Supreme Court, U.S.
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No. 92-932 (2)

In the Supreme Court of the United States

October Term 1992

LEON C. BAKER,

Petitioner,

v.

J. R. BENNETT AND LAURA BENNETT,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court should review the factual findings of the Alabama Supreme Court that Petitioner had sufficient contacts with Alabama to satisfy due process in connection with the exercise by the Alabama courts of personal jurisdiction over Petitioner.

2. Whether Petitioner raised the choice of law and commerce clause issues in a timely fashion.

3. Whether it was constitutionally permissible to apply Alabama law.

4. Whether the exercise of jurisdiction over Petitioner violated the commerce clause.

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BRIEF FOR RESPONDENTS

Respondents J. R. and Laura Bennett (the "Bennetts") respectfully request that this Honorable Court deny the petition for writ of certiorari, seeking review of the Alabama Supreme Court's opinion and judgment in this case. The opinion of the Alabama Supreme Court is reported at 603 So.2d 928 (Ala. 1992) and is set forth beginning at page A-6 of the Appendix to the petitioner's brief.

STATEMENT OF THE CASE[1]

A. The Facts

The petition is from a decision of the Alabama Supreme Court affirming a $440,025 judgment of the Circuit Court of Madison County, Alabama, entered pursuant to a jury verdict for the respondents, J. R. and Laura Bennett (the "Bennetts") against petitioner Leon C. Baker ("Baker"). (C 785-786). The Bennetts claimed that Baker and his agent and co-conspirator, Huntsville, Alabama resident S. David Johnston ("Johnston"), for their own pecuniary gain, fraudulently induced the Bennetts to purchase an interest in a tax shelter that the IRS later determined to be "abusive." (D 29).

The record in this case in the courts of Alabama is over 3,000 pages long. From its review of this extensive record, the Alabama Supreme Court found the following facts relevant to the due process issue presented by the petition:

> (1) Baker intentionally sent documents to Alabama to be executed in Alabama by Alabama residents;
>
> (2) Baker obtained promissory notes from Alabama residents that were payable at Alabama banks;
>
> (3) Baker mailed numerous items related to the transaction to Alabama; and

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[1] The record in the Alabama courts has two parts, the reporter's record, a transcript of the trial proceedings, and the clerk's record, pleadings, motions, and other documents, including depositions, filed in the case. Citations to pages of the transcript are preceded by R (e.g., R32) and to the clerk's record by C (e.g., C34). Plaintiffs' exhibits are preceded by P (e.g., P21) and defendants' exhibits are preceded by D (e.g., D4). There is no appendix to this brief, but citations to the appendix to the petition are preceded by A (e.g., A-21).

(4) Baker accepted over $580,000 in cash payments from Alabama residents in connection with the transaction.

(A-19).

Petitioner, in his recitation of the facts, attempts to leave the impression that none of the parties to the dispute had any connection with Alabama at the time the fraud was committed. To the contrary, the Bennetts were long-time residents of Alabama at the time they were defrauded. (R 476-485).

The petitioner's statement of facts is replete with argument, including arguments as to disputes of fact which were resolved against him by the jury. Petitioner even complains at length about alleged misconduct by respondents' counsel, conveniently ignoring prompt curative instructions given by the trial court. There are many other irrelevant facts stated, and the petitioner ignores a plethora of other contacts Baker had with Alabama (which are matters of record but which the Alabama Supreme Court felt unnecessary to its decision). At any rate, it is unnecessary for this Court to reexamine the record below. The Alabama Supreme Court, as noted above, found sufficient facts upon which to base specific jurisdiction over Baker.

B. Failure to Timely Raise Federal Questions

The due process issues raised by petitioner's questions 1 and 2 were raised in a timely fashion and it is appropriate for this Court to consider them. However, the choice of law and commerce clause issues (petitioner's questions 3 and 4) were not raised before the trial or in Baker's initial brief to the Alabama Supreme Court. As admitted in the petition (p. 12), these issues were raised

for the first time in Baker's brief to the Alabama Supreme Court in support of his Application for Rehearing. Thus, these issues were not timely raised, and this Court should not review them now.

REASONS FOR DENYING THE WRIT

Summary of Argument

The petition presents no question which warrants review by this Court. Contrary to petitioner's misstatement of fact that specific jurisdiction over him was based "solely on unsolicited long distance telephone calls made from Alabama to him in New York," the Alabama Supreme Court, referring to the extensive trial court record, made specific factual findings that petitioner "intentionally sent documents to this state to be executed by residents here, that he obtained promissory notes from Alabama residents that were payable in Alabama banks, that he mailed numerous items related to the computer lease transaction to the state, and that he accepted over $580,000 in cash payments from Alabama residents. . . ." (A-19). The Alabama Supreme Court, based on the voluminous record below, correctly concluded that "the repercussions of these acts would be felt by the Alabama residents involved. . . ." (A-19). Petitioner also contends that the Alabama Supreme Court exercised general jurisdiction over him, but that question was never reached since the Alabama courts had specific jurisdiction over him because of his contacts with Alabama in connection with this transaction. Thus, the holding of the Alabama court on the one federal question timely raised for review, i.e., the due process issue, was based on a fact-specific, traditional minimum contacts analysis. Because of

petitioner's extensive contacts with Alabama, this case does not present an appropriate vehicle for discussion of the policy issues raised by petitioner (Petition, pp. 13-16) regarding interstate transmission of professional services.

Petitioner did not timely raise the other federal questions as to which he now seeks review. As admitted in the petition (p. 12), petitioner first mentioned the choice of law and commerce clause issues in his Application for Rehearing in the Alabama Supreme Court. That is simply too late. Petitioner offers no excuse for his failure to raise these issues in a timely fashion, and this Court should not hear them now.

On the merits of the choice of law issue, for the many reasons stated in the personal jurisdiction argument above, Alabama clearly had a sufficient aggregation of contacts with the dispute to justify the application of Alabama law. Alabama's version of mistaken or innocent misrepresentation was specifically pleaded in the complaint. Moreover, contrary to petitioner's assertions, the opinion of the Alabama Supreme Court is based on intentional fraud. The Alabama Supreme Court simply noted that under Baker's theory, i.e., that he acted mistakenly and not intentionally, he could still be found guilty of legal fraud under Alabama law. At any rate, as noted, the courts of Alabama had ample contacts with the dispute to justify the application of Alabama substantive law.

There is no merit to petitioner's attempt to apply outdated commerce clause cases to modern due process, personal jurisdiction analysis. As pointed out herein, petitioner had sufficient contacts with Alabama to support personal jurisdiction over him.

ARGUMENT

A. Petitioner Had Sufficient Contacts With Alabama To Support Specific Jurisdiction Over Him.

In rejecting petitioner's argument that he was not subject to the jurisdiction of the Alabama courts, the Alabama Supreme Court found that petitioner Baker had the following contacts with Alabama:

> (1) Baker intentionally sent documents to Alabama to be executed in Alabama by Alabama residents;
>
> (2) Baker obtained promissory notes from Alabama residents that were payable at Alabama banks;
>
> (3) Baker mailed numerous items related to the transaction to Alabama; and
>
> (4) Baker accepted over $580,000 in cash payments from Alabama residents in connection with the transaction.

(A-19).

Under the principles set forth by this Court, those contacts were sufficient to justify jurisdiction over petitioner. *Calder v. Jones*, 465 U.S. 783 (1984); *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). Certainly, it was foreseeable that the effects of petitioner's activities would be felt in Alabama. Baker attempts to confuse the issue by claiming that the Alabama courts exercised general jurisdiction over him. However, contrary to Baker's claim, the Alabama Supreme Court found specific jurisdiction over Baker pursuant to a traditional, minimum contacts analysis. (A-18-19).

Moreover, petitioner ignores the fact that Johnston, the Alabama accountant who participated in the transac-

tion, was allegedly petitioner's agent. The Alabama jury was expressly charged on the issue of the Alabama accountant's status as an agent for petitioner or as a co-conspirator. The Alabama Supreme Court (A-18-19) said: "A party has sufficient contacts with the State of Alabama when that person, acting directly *or by agent*, is or may be personally responsible as a consequence of that person's transacting business in this state." (Emphasis added.) There is a preponderance of evidence in the record that the Alabama accountant was Baker's agent in the scheme. "An individual also may be subject to the jurisdiction of the court because of the activities of his agent within the forum state. . . . " 4 Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1069, pp. 410-11 (2d ed. 1987).

B. The Choice Of Law Issue Was Not Timely Raised Below And Has No Merit.

Petitioner did not attempt to raise the choice of law issue until filing of his Brief in Support of Application for Rehearing. (Petition, p. 12). Alabama law is clear that new issues cannot be raised for the first time on application for rehearing. *Stover v. Alabama Farm Bureau Ins. Co.*, 467 So.2d 251, 253 (Ala. 1985). See *Beck v. Washington*, 369 U.S. 541, 549-554 (1962); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). The Alabama Supreme Court did not consider and dispose of the choice of law issue. Moreover, petitioner cannot claim he was surprised, as the mistaken or innocent misrepresentation claim was expressly stated in the complaint.

Petitioner also argues that Alabama's exercise of legislative jurisdiction (i.e., applying Alabama's substantive law of fraud to this case) violates due process and full faith and credit. (Petition, pp. 30-35). In particular,

Baker complains of Alabama's cause of action for mistaken or innocent misrepresentation or "legal fraud." Baker argued in his Brief in Support of Application for Rehearing before the Alabama Supreme Court that he was due a new trial because that court had decided the case on an issue that was not tried, i.e., whether Baker was liable for mistaken or innocent misrepresentation. However, plaintiffs' pleadings very clearly stated a claim for mistaken misrepresentation. Further, Baker was represented at every stage by experienced Alabama counsel. Baker could not have been surprised by the application of Alabama law.

The petition also fails to raise a substantial choice of law issue because Alabama had every right to apply its substantive law to this case. Many of the contacts this case had with the State of Alabama have been detailed in the prior section regarding personal jurisdiction. At all pertinent times, the Bennetts were residing in Alabama. Baker made his representations directly to them in Alabama, and through his Alabama agent, Johnston. In reliance, Alabama citizens executed Baker's documents in Alabama and sent Baker checks drawn on Alabama banks. Baker also accepted promissory notes from Alabama residents which were payable at their Alabama banks.

Petitioner (pp. 33-34) correctly notes that *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), require that a state must have a "significant contact or significant aggregation of contacts" before it can exercise legislative jurisdiction and apply its substantive law to the case.

The State of Alabama had a constitutionally-sufficient aggregation of contacts in this case. Alabama had an interest in protecting the rights of the respondents who were Alabama citizens at the time of the fraud. The peti-

tioner intentionally dealt with Alabama citizens, knowing that the ill effects of his fraud would be felt in Alabama. Also, the facts supported the finding that an Alabama accountant, Johnston, acted as Baker's agent in this and other fraudulent schemes. Alabama clearly has a significant aggregation of relevant contacts.

C. The Commerce Clause Issue Was Not Timely Raised Below And Has No Merit.

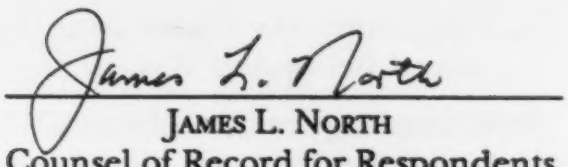
Petitioner argues that Alabama's exercise of personal jurisdiction over him violates the commerce clause. (Petition, pp. 35-38). As noted with respect to the choice of law issue, this question was not timely raised. (Petition, p. 12).

In addition, the commerce clause issue fails to present a substantial federal question. Today, a defendant's right not to be unconstitutionally subjected to suit in an unfairly inconvenient forum is thoroughly protected by due process analysis, i.e., the "minimum contacts" test.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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